SUPREME COURT, U. S.

Supreme Court, U. S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 73-1813

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL NO. 10,
Petitioner,

VS.

ROY O. HOFFMAN, Director, Region 20, NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL NO. 10

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The Memorandum for the Respondent appears, in the main, to be an attempt to limit the scope of the writ of certiorari to questions relating to the right to a jury trial in the criminal contempt proceedings

(Memo, p. 25).[1] While those questions are important and should, of course, be reviewed here, nothing in the Memorandum supports the suggestion that this Court should refuse to review the equally important questions presented in the civil contempt proceeding. As this very case illustrates, a labor union may be as severely punished in a civil, as in a criminal, contempt action. Respondent's concession that an inter-circuit conflict in the criminal aspect of the case requires resolution, does not justify ignoring that the civil aspect of the case presents equally important inter-circuit conflicts as well as an egregious deviation from well-established principles in the law of civil contempt. This is particularly true where, as here, one of the petitioners was acquitted of the criminal contempt yet was heavily fined in the civil case.

I

In the face of the virtually unanimous authority in the circuits that civil contempt is required to be proved not by a mere preponderance of the evidence but by evidence which is both clear and convincing

[1]We refer here and throughout to the "Memorandum for the Respondent" dated October 1974 and signed by the Solicitor-General as well as by counsel for the National Labor Relations Board. An earlier document, dated August 26, 1974 and entitled "Brief for Respondent, California Newspapers, Inc., d/b/a San Rafael Independent Journal, in Opposition", has also been filed. We do not believe that California Newspapers, Inc. is a party to the instant proceeding within the meaning of this Court's Rule 21(6) since it was not a party to the proceeding in either of the Courts below. In any case there is nothing in its Brief in Opposition which we believe requires comment from us at this time and we shall address ourselves solely to the Memorandum submitted by the Solicitor-General and counsel for the National Labor Relations Board.

(Pet., 73-1813, pp. 13-17),[2] respondent does not suggest that Local 10's legal position is unsound. Nor does respondent dispute that the standard which the district court explicitly stated it was applying was indeed an improper standard for it to have applied.

Under these circumstances, and in an apparent effort to avoid a forthright concession that the decision below is in flat conflict with the virtually unanimous views of the other circuits on this question, respondent falls into the error, condemned in *United States v. United Mine Workers of America*, 330 US 258, 299 (1947), of "mingling . . . the civil and criminal proceedings." He argues that since the evidence used to establish criminal liability was also later used to establish civil liability, Local 10 has no cause for complaint: "it follows that the civil contempt was likewise established by that same high standard" (Memo, p. 16).

However one may view this argument in the cases of those actually found guilty of the criminal contempt here, it simply has no application to Local 10. For, as to Local 10, the Court had found that the allegations of criminal contempt "have *not* been proved beyond a reasonable doubt" (R. 1218, 1219; Tr. 2638; italics supplied). Thus "*the* civil contempt" against Local 10 cannot be sustained by any reliance

[2]In the short time since the petition herein was filed, the Court of Appeals for the Sixth Circuit (*Local 98 v. NLRB*, 497 F2d 60, 64-65 [6 Cir. 1974]) and the District Court for the Southern District of New York (*Weinman v. Iron Workers, Local 40*, ——— F.Supp. ———, 87 LRRM 2131, 2132 [Aug. 2, 1974]), have once again reiterated that the standard is not a mere preponderance, but rather that the evidence must be "clear and convincing".

upon the criminal contempt findings against the others.

Furthermore, respondent's attempted explanation of the District Court's acquittal of Local 10 in the criminal case is contrary to what that Court itself made clear by its finding that the case against Local 10 had not been proved beyond a reasonable doubt and is based upon a misreading of the record. Respondent says that the District Court "emphasized" that Local 10 was acquitted "solely because the proof of [its] involvement in the contumacious conduct fell short of demonstrating the wilfulness required of criminal, as opposed to civil, contempt (Tr. 2639)." (Memo, p. 11). The argument is repeated, with the same transcript citation, almost word for word at page 15.

Now the transcript is in the clerk's office in San Francisco, not in the clerk's office in Washington. But, so that there can be no mistake about what appears in the transcript at page 2639, so far as it concerns Local 10, we quote it verbatim here:

> "With respect to International Longshoremen's and Warehousemen's Union, Local No. 10, my finding in respect to the acquittal of this union of criminal intent [sic] is based not so much on the fact that they did not have some knowledge of the order in question through service upon them of the temporary restraining order, but rather upon the fact that assuming they had some knowledge of the order, that their involvement here has not been sufficiently brought home to the union itself in such a manner as to convince me

> that whatever they did was done contemptuously. I do find, however, that the allegations of the petition have been proved by a preponderance of the evidence as to—for the purposes of civil contempt, not only as to Local 21 and Abrams and Local 85 and Richardson and Local 70 and Muniz, but also as to International Longshoremen's Union No. 10."

Immediately preceding this the Court had announced:

> "First, I find from the evidence in this case beyond a reasonable doubt that the allegations of the petition have been proved insofar as they pertain to Typographical Union No. 21 . . . Local 70 . . . and . . . Muniz.
>
> "I find that the allegations of the petition have not been proved beyond a reasonable doubt as to International Longshoremen's and Warehousemen's Union Local No. 10 . . ." (Tr. 2638).

What the District Court did, therefore, was, first, to find that the criminal case against Local 10 had *not* been proven beyond a reasonable doubt. Then, it turned to the civil case and found that that case had been proved by a preponderance of the evidence. The legal standard it applied in the civil case was just plain wrong.[3]

The reason assigned by the Solicitor-General, speaking for the Labor Board, to justify the Court of Appeal's approval of this deviation from the near

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[3]After the petition herein was filed, the Court below, in another case, recognized the importance of using the proper standard: ". . . we refuse to say that the trial court's imposition . . . . of the wrong burden of proof was harmless" (*United States v. Cales*, 493 F2d 1215, 1216 (9 Cir. 1974)).

unanimous rule that civil contempts may not be sustained unless they have been proved by clear and convincing evidence, is really not worthy of his high office. It plainly does not warrant a refusal by this Court to review and redress the egregious error in the law of civil contempts manifested by the decision below.

II

Insofar as the response addresses the question of the lack of "actual notice" to Local 10, it is remarkable for its failure to cite, much less to consider, the rule underlying federal contempt practice or the most recent decisions of this Court applying that rule to civil contempt proceedings. Thus neither Fed. R. Civ. Pro. Rule 65[d] nor *Granny Goose Foods, Inc. v. Brotherhood of Teamsters,* 415 US 423 (1974) or *Allee v. Medrano,* ..... US ....., 40 L.Ed.2d 566 (1974) is so much as mentioned in the response. Those cases clearly establish—or, really, merely most recently reiterate—that "one basic principle built into Rule 65 is that those against whom an injunction is issued should receive fair and precisely drawn notice of what the injunction *actually* prohibits" (415 US at 444; italics supplied) and that injunctions issued with respect to incidents involved at one location may not be applied to incidents which later occur at other locations(..... US at ....., 40 L.Ed.2d at 577).[4]

[4]Nor does the response cite the earlier decision of this Court, *International Longshoremen's Association v. Philadelphia Marine Trade Association,* 389 US 67 (1967) to the same effect or the decisions of the Courts of Appeal for the Second, Third and Tenth Circuits, all of which conflict with the decision below on this point. *New York Telephone Company v. Communication*

In this connection, the response acknowledges, as it must, that the two decrees here involved deal with two entirely different subject matters and places: The February decree with the picketing of rolls of newsprint "at the Port of San Francisco" (Memo, p. 4), the April decree with picketing of advertisers in Marin County (p. 6). It also acknowledges, as it must, that the only order of which Local 10 had "actual knowledge" was the February order (p. 5) and that the picketing upon which the civil contempt adjudication against Local 10 was based was alleged to be a violation not of the February, but of the April, order (pp. 9-10, n. 5). Thus, on its face, there is, at the minimum, an apparent violation of Rule 65's command that the order shall bind only those who receive "actual notice" of its "specific terms".

Respondent seeks to foreclose review of this situation by arguing that the service of the February temporary restraining order, which admittedly expired by its own terms on the very day on which it was served (Memo, pp. 4-5), put Local 10 "on notice" that "it was *possible* that the injunction would be

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Workers of America, 445 F2d 39 (2 Cir. 1971); *United States v. Hall*, 198 F2d 726, 729 (2 Cir. 1952); *Ford v. Kammerer*, 450 F2d 279, 289 (3 Cir. 1971); *Yates v. United States*, 316 F2d 718, 723 (10 Cir. 1963).

The Circuit decision in the *Philadelphia Marine Trade Association* case (368 F2d 932, 934 (3 Cir. 1966), which was reversed by this Court, is cited in connection with one aspect of the jury trial argument in the criminal case (Memo, p. 18, n. 8). Nowhere, however, does respondent refer to this Court's holding, applicable to the civil case here, that an error resulting from the failure of a decree to comply with the mandate of Rule 65(d), that it "state in 'specific . . . terms' the acts that it . . . . prohibited" is not "'minor and in no way decisional'"; but, rather, is "both serious and decisive." (389 US at 76).

continued" (pp. 14-15; italics supplied). Such an argument is not tenable in the face of the foregoing "basic principle built into Rule 65"; but, even ignoring this, the only injunction which anyone could have expected to have been "continued" would have been the one dealing with picketing newsprint at the Port of San Francisco. Local 10 was not charged with having violated *that* injunction.

In an attempt to close this gap, respondent is forced to argue that Local 10 "was under an obligation to inquire whether any '*further* order of the Court' had been entered" (p. 15; italics supplied) before it engaged in otherwise lawful activities which the temporary restraining order had not prohibited. Not surprisingly, no authority is cited for this extraordinary proposition. Rule 65(d) and the cases applying it would seem to make it clear that it is the moving party who is required to establish that the alleged contemnor had actual knowledge of the specific terms of *the* order. Nothing in the rule or the cases would appear to impose on the alleged contemnor a duty or obligation to "inquire whether 'any further order' " had been made.

Considering the nature of a contempt proceeding—it is a "potent weapon" which can be (and in this case was) transformed into a "deadly one" (*International Longshoremen's Association v. Philadelphia Marine Trade Association, supra,* 389 US at 76)—the rule cannot reasonably be read otherwise. No more than one should "be left to guess" about an injunction's intended *duration* (*Granny Goose Foods, Inc. v. Broth-*

erhood of Teamsters, supra, 415 US at 444) should one be left to guess about its intended *scope.*

This Court should not permit such a relaxation of the safeguards deliberately built into Rule 65 as is revealed by the record in this case.

CONCLUSION

The Solicitor-General urges this Court to review this case to determine whether the District Court, with the approval of the Court of Appeals, improperly deprived certain petitioners of a jury trial on the criminal contempt charge. There simply is no reason for him to suggest that this Court, during the course of that review, should close its eyes to this petitioner's contentions that the adjudication of civil contempt ran counter to one of the basic principles built into Fed. R. Civ. Pro. Rule 65(d) and the cases applying that rule and was, in addition, predicated upon a view of the law concerning the requisite standard of proof in civil contempt cases which is contrary to the view of practically every other federal court in the nation.

Dated, San Francisco, California,
October 21, 1974.

Respectfully submitted,
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